

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

COVISINT LLC

and

Case 7-CA-45763

JAMES BIST, An Individual

Robert A. Drzyzga and Robert M. Buzaitis, Esqs.,
for the General Counsel.
Donald A. Van Sullichem, Esq.,
of Bloomfield Hills, MI,
for the Respondent.

DECISION

Statement of the Case

MARTIN J. LINSKY, Administrative Law Judge. On December 30, 2002, a charge in case number 7-CA-45763 was filed by James Bist, an individual, against Covisint LLC, Respondent herein.

On February 27, 2003, the National Labor Relations Board, by the Regional Director for Region 7, issued a complaint alleging that Respondent violated Section 8(a)(1) of the National Labor Relations Board, herein the Act, when it unlawfully interrogated James Bist, when it unlawfully maintained, promulgated and enforced overly-broad rules with respect to employees' Section 7 rights to engage in the protected concerted activity of discussing salary and bonus information, and when it discharged James Bist.

Respondent filed an answer in which it denied that it violated the Act in any way.

A hearing was held before me in Detroit, Michigan, on August 12 and 13, 2003.

Upon the entire record in this case, to include the post hearing briefs submitted by Counsel for the General Counsel and Counsel for Respondent and giving due regard to the testimony of the witnesses and their demeanor I issue the following

I. Findings of Fact

Respondent, with an office and place of business in Southfield, Michigan and with additional facilities located outside the United States, has been engaged in the business of providing software and services to various companies.

Respondent admits, and I find that it is an employer engaged in commerce with the meaning of Section 2(2), (6), and (7) of the Act.

There is no labor organization involved in this case.

II. Alleged Unfair Labor Practices

5 A. Bist Discovers the Document

James Bist was a contract employee for Respondent from October 2000 to April 2001. In April 2001 he became a direct hire of Respondent. He was a solutions engineer.

10 Prior to beginning employment with Respondent as a direct hire he was given a written job offer that included, among other things, base salary and bonus target and was advised in writing that the offer was made in "the strictest confidence" and all information, to include salary and bonus target, was "confidential." Disclosure would result in the offer being summarily withdrawn.

15 Upon becoming a direct hire in April 2001, Bist signed an employment agreement, which provided in part that he could not discuss "salaries" with anyone outside Covisint with the exception of his spouse, attorney, tax and financial advisor.

20 Upon being hired Bist was given a copy of Respondent's handbook, which contained the following rule

"2.9 Employment Information

25 Covisint relies upon the accuracy of information contained in the employment application as well as the accuracy of other data presented throughout the hiring process and employment. Any misrepresentations, falsifications, or material omissions in any of this information or data may result in Covisint's exclusion of the individual from further consideration for employment or if the person has
30 been hired, termination of employment. It is the responsibility of each employee to promptly notify Covisint of any changes in personal data. Personal mailing addresses, telephone numbers, number and name of dependents, individuals to be contacted in the event of an emergency, educational accomplishments, and other such data should be accurate and current at all times. Data changes
35 should be submitted to Human Resources in writing (use the Employment Status Change Form located on the Covisint Hub).

Confidential Employment Information

40 All information as it relates to the status of employment is confidential and may not be shared with other employees. This includes, but not limited to salary, bonus, options or other types of compensation.

45 Disregard or failure to comply, could lead to disciplinary action, up to and including termination of employment."

In March 2002 Bist was assigned a new computer. The computer assigned to Bist had previously been assigned to another employee of Respondent.

50 Bist found a file on his new computer entitled "Bonus List." He opened the file and found a 5 page document listing the name, salary, bonus, and target bonus of all 222 employees of Respondent from CEO on down. The document was not marked "confidential."

Bist then proceeded to share this information with a number of his fellow employees to include Don Gindhart, Nichelle James, Joanne Ortolan, John Micallef, Ted Yura, Stuart Jankelovitz, Matt Russell, and Andre Arbelaez. Fellow employee Matt Fakete told Bist to destroy the list and don't discuss it with anyone. Fellow employee Al Harrah refused to look at the list.

Bist did not share the information with anyone outside Covisint. However, he did e-mail a copy of the document to Nichelle James who was on maternity leave when she came in the office and Bist first showed her the list. James in turn showed the document to her husband who was not an employee of Covisint although Bist never said to James that she should or could show it to her husband.

Bist and the others to whom he showed the document compared their salaries to the salaries of their peers for comparison purposes. The employees principal concern was to see if peers made more or less than they did.

It was apparent to Bist and the several other employees who testified before me that they thought they were looking at something they weren't supposed to be looking at.

B. Incident at Copper

Canyon Restaurant

On June 26, 2002, a number of employees and some members of management went to the Copper Canyon bar and restaurant for an after work get together.

Late in the evening Bist got into an argument with Respondent's Director of Security Dave Miller. Miller is a supervisor and agent within the meaning of the Act.

Earlier on June 26, 2002 there had been a lay off of some of Respondent's employees. Bist had survived the lay off as he had survived two earlier lay offs.

Bist and Miller argued about the lay off with Miller arguing that the lay off was a good thing and the company didn't need the people it laid off and that he (Miller) could do Bist's job if Bist had been laid off.

Bist, in an attempt to one-up Miller, said that Miller wasn't even that good at the job he had as Director of Security because if he was good at it Bist would not be able to have in his possession a list of salaries and bonuses for all employees of Covisint.

Miller didn't believe Bist had such a list and asked Bist to produce the list.

Bist went to his car in the Copper Canyon parking lot and returned with the list. He showed it to Miller and then gave it to Miller. Miller told Bist he was going to be fired for possession of the list. Miller admits that he told Bist he would be fired for possession of the list and Matt Fakete, who I credit and who was present at the Copper Canyon on the night of June 26, 2002, testified that Miller repeatedly told Bist that he was going to be fired.

C. Subsequent Events

Miller informed Respondent's General Counsel Michael O'Rourke that Bist had possession of the list of salaries and had given it to Miller.

O'Rourke and another member of Respondent's management, Wes Arrington, met with Bist on June 28, 2003.

5 Bist was asked how he got the list and by his own admission lied and said he found it in an empty cubicle. Bist was asked if he had shown the list to anyone other than Miller and Bist admittedly lied again and said no.

O'Rourke told Bist there would be an investigation.

10 On July 9, 2002, Bist met with Respondent's Human Resources Vice President Dwaine Duckett and Jeffrey Peter shortly after 3 p.m. Duckett told Bist that O'Rourke didn't believe Bist and Bist was going to be fired for violation of the Company policy about not discussing salaries. Duckett also asked Bist if he had shared the salary information with anyone else and Bist said he didn't. The meeting lasted about 20 or 25 minutes and was over by 3:30 p.m. on July 9.

15 Bist claims he lied about sharing information on the list with anyone else to both O'Rourke and Duckett and says he did so because he didn't want to get any of his coworkers in trouble and because he figured he was going to be fired in any event because of what Director of Security Dave Miller had told him at the Copper Canyon on June 26.

20 Just one hour after Bist was fired Todd Zarotney from Human Resource Operations sent to all employees the following e-mail:

25 "From: Zarotney, Todd
To:
Cc:
Subject: Confidential Information
Attachments:

30 _____
Team,

35 As a reminder, Section 2.9 of the Employee Handbook states that it is a violation of policy to obtain, possess, and/or distribute confidential personnel information. The policy specifically reads:

40 'All information as it relates to the status of employment is confidential and may not be shared with other employees. This includes, but is not limited to salary, bonus, options or other types of compensation.

Disregard or failure to comply, could lead to disciplinary action, up to and including termination of employment.'

45 It is important that any employee aware of the possession or distribution of such information should apprise Human Resources as soon as they become aware of the situation. Withholding such knowledge is also considered a violation of this policy.

50 As always, any reports will be investigated promptly in an impartial manner and as confidentially as possible.

If you have questions regarding this or other Covisint employment policies, please refer to the Covisint Employee Handbook v. 1.1 on the hub or contact Human Resources for clarification.

5 Sincere Regards,
Todd M. Zarotney
HR Operations, Covisint, LLC
(p) . . .
(f) . . .”

10 Bist’s testimony, which I credit, as to what Duckett told him was the reason he was being fired is corroborated by the above e-mail sent to all employees just one hour after Bist was fired.

Duckett’s testimony as to what he told Bist was as follows:

15 “Q Did you advise him he was terminated?

A What I said to him was, you know, is there anything else that you’d like to add, was there anybody else involved with this. He said he didn’t want to, you know, comment on those things. I said, well, right now it pretty much looks like you’re the source and the issue here and, if you’re willing to sort of leave with that being the case, then we’re not going to have any choice but to terminate you, I need to check a couple other things out, but I’m prepared to get my stuff and leave.

25 Q Did you tell him that he was discharged for discussing the list with any other employee?

A No. Not for discussing it. It was more because it was downloaded, from what we had heard, and distributed and how it was distributed, en masse. it wasn’t like there was one copy. There were copies of it.

Q Okay. And that was the basis for Mr. Bist being terminated?

35 A Yes.”

Bist testified as follows:

40 “Q Your meeting with Duckett. What day was that?

A July 9th of 2002.

Q And do you recall what Duckett specifically said to you when he discharged you?

45 A He told me that I was being terminated effectively immediately for violation of the company policy regarding prohibiting discussion of salaries. I take that – Regarding salary discussions. I don’t believe he said prohibiting.

50 Q He didn’t reference a rule? Did he reference a rule?

A I don’t believe so.

Q You previously testified that you were aware of the rules, is that correct?

A That's correct."

5

I credit Bist over Duckett. Bist seemed credible on the stand before me and is corroborated by the e-mail sent out later that day. The e-mail reiterated the policy of not discussing salaries which is the reason given Bist for his discharge.

10

O'Rourke interviewed Bist on June 28 and didn't believe Bist when Bist said he hadn't shared the information on the list with others. He also didn't believe Bist as to where he found the list. O'Rourke later met with Respondent's Senior Leadership Team (SLT). O'Rourke testified on direct as follows:

15

"Q What was – what was the decision as to the reasons for termination?

20

A We discussed the fact that he had had this confidential document and taken it to the bar, the Copper Canyon, and was sharing it there in the course of a heated argument, that this was confidential information that employees were not supposed to be taking out of the building and sharing it, and that was a significant enough offense that it merited a termination.

25

Q In making this recommendation for termination, did you consider whether Mr. Bist had shared the document with other employees?

30

A We had no information at that point. I had no information, so that the meeting that I was in there was no discussion that he had shared it with other employees, other than Dave Miller in the bar, because he had told me he didn't and I had no other information at that time.

35

Q Okay. Was your concern at the time you made the decision that Mr. Bist had talked to other employees about the salary levels of employees?

A No. As I said, we had no knowledge that he had shared this with anyone else, other than Dave, and what Dave had reported included nothing about salaries. Nothing about a discussion of his salary, for example."

O'Rourke further testified on cross-examination:

40

"Q Okay. Who made the actual decision to terminate Mr. Bist?

A That was a executive decision, as I said, made at the senior leadership team level.

45

Q Who made the decision?

A The team made the decision.

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Q The complete team?

A In the course of the discussion and consensus, yes. We didn't take an actual vote.

Q And what were the reasons Mr. Bist was terminated?

A Mr. Bist took a confidential document, took possession, kept possession, did not report that he had it, took it outside of the office, and was sharing it in the bar in the course of an argument.

Q And that is the reason why he was terminated.

A Correct."

Counsel for the General Counsel subpoenaed any files (or documents) Respondent had in its possession in connection with the investigation of Bist and any documents made in connection with his discharge such as a termination notice, etc. Respondent could find no records whatsoever.

Respondent put into evidence the decision of the Michigan Unemployment Commission, which was as follows:

"YOU WERE FIRED FROM CONVINT (SIC) ON 7/9/02, AFTER YOU GAVE A COPY OF PAYROLL TO AN UNAUTHORIZED PERSON. BASED ON THE FACTS ON HAND, IT IS DEEMED THAT YOUR DISCHARGE WAS DUE TO YOUR EXERCISING POOR JUDGMENT RATHER THAN ANY ACT(S) OF BLATANT OR WILLFUL WORK RELATED MISCONDUCT.

IT IS FOUND THAT YOU WERE NOT FIRED FOR A DELIBERATE DISREGARD OF YOUR EMPLOYERS INTEREST. YOU ARE NOT DISQUALIFIED FOR BENEFITS UNDER MES ACT, SEC. 29(1)(B)."

Contrary to Duckett's testimony recited above the only person Respondent knew that Bist had showed the list to was Respondent's Chief of Security, Dave Miller.

D. Analysis

Employees who divulge information that the employer is privileged to conceal are not engaged in protected activity. Thus, in *International Business Machines Corp.*, 265 NLRB 638 (1982), the Board found a valid business justification for the employer's rule regarding distribution of wage data that it had compiled and classified as confidential. While the rule did not preclude employees from discussing their own wages with each other, they could not have access to nor distribute company-compiled information. In upholding the discharge of an employee who disclosed wage information in violation of the rule, the Board refused to hold categorically that a company could enforce a confidentiality policy by discharging any employee who disseminated confidential wage information regardless of the circumstances. Here, the discharge was not unlawful because the employee knew that the documents had been classified as confidential, he was aware of the company's rule prohibiting their distribution, and he had not obtained the information under circumstances that would lead him reasonably to believe that his possession and dissemination of the material was authorized.

In *Lafayette Park Hotel*, 326 NLRB 824 (1998), a divided Board decided that the employer's rule prohibiting employees from "[d]ivulging Hotel-private information to employees or other individuals or entities that are not authorized to receive that information" was not overly broad. The majority reasoned that although the term "hotel-private" was not defined, employees

would not read the rule to prohibit the discussion of wages and working conditions with co-workers or a union.

The Board recently in *Labinal, Inc.*, 340 NLRB No. 25 (September 16, 2003) and *Medione of Greater Florida, Inc.*, 340 NLRB No. 39 (September 19, 2003) reiterated that it is unlawful to have a rule prohibiting employees from being discussing salaries and other compensation and, of course, you can not lawfully discipline an employee for discussing salaries and other compensation with his fellow employees. As the majority at p. 3 in *Medione of Greater Florida, Inc.*, supra, stated "We agree with our dissenting colleague that discussion of wages is part of organizational activity and employers may not prohibit employees from discussing their own wages or attempting to determine what other employees are paid."

Was Bist discharged for divulging confidential wage data that Respondent was privileged to conceal or was he discharged for discussing wages.

I find it was for the latter reason since I credit Bist on the reason he was told he was being fired and because just one hour after his discharge an e-mail referring to the part of Rule 2.9, which prohibited the discussion of salaries and other compensation was sent to all employees.

Accordingly, Respondent violated Section 8(a)(1) of the Act when it discharged James Bist.

E. Rule 2.9

Rule 2.9 of the employee handbook is set forth in its entirety in Section II A above.

After the charge was filed Respondent acting on the advice of their Counsel in this case changed the rule effective February 25, 2003 so it would be lawful. The revised Rule 2.9 is as follows:

"2.9 Employment Information

Covisint relies upon the accuracy of information contained in the employment application as well as the accuracy of other data presented throughout the hiring process and employment. Any misrepresentations, falsifications, or material omissions in any of this information or data may result in Covisint's exclusion of the individual from further consideration for employment or if the person has been hired, termination of employment. It is the responsibility of each employee to promptly notify Covisint of any changes in personal data. Personal mailing addresses, telephone numbers, number and names of dependents, individuals to be contacted in the event of an emergency, educational accomplishments, and other such data should be accurate and current at all times. Data changes should be submitted to Human Resources in writing (use the Employment Status Change Form located on the Covisint Hub)."

Respondent eliminated the following language from Rule 2.9

"Confidential Employment Information

All information as it relates to the status of employment is confidential and may not be shared with other employees. This includes, but not limited to salary,

bonus, options or other types of compensation.

Disregard or failure to comply, could lead to disciplinary action, up to and including termination of employment.”

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The language wisely eliminated from Revised Rule 2.9 is the exact language that was quoted in the e-mail posted just one hour after Bist was fired. Duckett could not remember if he told Zarotney to send that e-mail or not. Zarotney did not testify.

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Respondent violated Section 8(a)(1) of the Act when it maintained Rule 2.9 in its employee handbook with the unlawful prohibition about discussing salaries up to February 25, 2003. The normal remedy of modifying an unlawful rule is not necessary in this case since Respondent, on the advice of Counsel, has already done so.

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F. Alleged Unlawful Interrogation

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James Bist was questioned about the salary and bonus list by both Michael O'Rourke on June 28, 2002 and Dwaine Duckett on July 9, 2002. The questioning of Bist on July 9, 2002 is alleged to constitute unlawful interrogation in violation of Section 8(a)(1) of the Act. I find under the circumstances that this did not constitute unlawful interrogation because parts of the document, e.g., the salary and bonus of upper management, contained the type of information which management could legitimately not want to fall into the hands of their competitors or possibly their clients.

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Respondent is a privately held company and this type of management compensation does not have to be made public.

Remedy

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The remedy for these unfair labor practices should be a cease and desist order, the posting of a notice, and having unlawfully discharged employee James Bist, Respondent must offer him reinstatement and make him whole for any loss of earnings and other benefits computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any interim earnings, as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

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Conclusions of Law

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1. Respondent, Covisint LLC, is an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act.

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2. Respondent violated Section 8(a)(1) of the Act when it maintained, promulgated, and enforced an overly-broad rule in its Employee Handbook up until May 2003 which prohibited employees from discussing salary and bonus information with one another.

3. Respondent violated Section 8(a)(1) of the Act when it discharged James Bist for discussing salaries with other employees.

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4. The above violations of the Act are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record I issue the following recommended¹

ORDER

Respondent, Covisint LLC, its offices, agents, successors, and assigns, shall:

1. Cease and desist from

(a) Unlawfully discharging employees because they discuss salaries and bonuses with one another.

(b) Maintaining an unlawful rule in its Employees Handbook, which prohibits employees from discussing salaries and bonuses with each other.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in the National Labor Relations Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order offer James Bist immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision.

(b) Within 14 days from the date of this Order remove from its files any reference to the unlawful discharge of James Bist and notify him in writing that this has been done and that his unlawful discharge will not be used against him in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Southfield, Michigan and all other places where notices customarily are posted, copies of the attached notice marked "Appendix A."² Copies of the notice, on forms provided by the Regional Director for Region 7 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or

¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

² If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing An Order of the National Labor Relations Board."

covered by any other material. In the event that Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 9, 2002.

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(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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Dated, Washington, D.C. November 26, 2003.

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Martin J. Linsky
Administrative Law Judge

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APPENDIX A

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT discharge employees because they discuss salaries and other compensation with their fellow employees.

WE WILL NOT maintain a policy that prohibits our employees from discussing salaries and other compensation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal law.

WE WILL offer employee James Bist immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify James Bist that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

COVISINT LLC

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

477 Michigan Avenue, Federal Building, Room 300, Detroit, MI 48226-2569

(313) 226-3200, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (313) 226-3244.